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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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14 CASE NO. 3:10-MD-02143 RS

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IN RE OPTICAL DISK DRIVE
ANTITRUST LITIGATION

16

17 This document relates to:

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19 INDIRECT PURCHASER ACTIONS

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MDL NO. 2143

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO DISMISS INDIRECT
PURCHASER PLAINTIFFS' FIRST
AMENDED CLASS ACTION COMPLAINT**

ORAL ARGUMENT REQUESTED

Date: Dec. 16, 2010
Time: 1:30 p.m.
Judge: The Honorable Richard Seeborg
Location: Courtroom 3, 17th Floor

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 16, 2010, at 1:30 p.m., or as soon thereafter as the matter may be heard, the undersigned Defendants will and hereby do move the Court, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), for an Order dismissing the Indirect Purchaser Plaintiffs' First Amended Class Action Complaint as to the undersigned Defendants without leave to amend.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities, the complete files and records in these consolidated actions, oral argument of counsel, and such other and further matters as the Court may consider.

* * *

STATEMENT OF THE ISSUES PRESENTED

The undersigned Defendants independently and jointly move to dismiss the Indirect Purchaser Plaintiffs' First Amended Class Action Complaint, and present the following issues:

- Whether the IP-FAC has alleged a plausible conspiracy under Fed. R. Civ. P. 8 and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007);
 - Whether Indirect Purchaser Plaintiffs have Article III standing to bring claims under the laws of certain states in which no putative class representative resides, nor claims to have suffered injury while residing;
 - Whether Indirect Purchaser Plaintiffs have alleged facts sufficient to establish subject matter jurisdiction under the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a
 - Whether Indirect Purchasers Plaintiffs have antitrust standing under *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983);
 - Whether the IP-FAC may assert nationwide claims under California's Cartwright Act (Cal. Bus. & Prof. Code §§ 16720, *et seq.*) and Unfair Competition Laws (*Id.* at 17200, *et seq.*); and
 - Whether the IP-FAC has alleged cognizable state antitrust and restraint of trade, or consumer protection and unfair competition, claims under the laws of various states.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

With near duplicate allegations, Indirect Purchaser Plaintiffs' First Amended Class Action Complaint ("IP-FAC") suffers from the same deficiencies which are addressed in Defendants' Joint Motion to Dismiss the Direct Purchasers' Consolidated Amended Complaint ("Joint DP Motion") and, for the same reasons, should also be dismissed.¹ There are, however, several aspects of the IP-FAC that are unique to it. As this brief demonstrates, those unique aspects do not save the complaint from dismissal, and in some instances provide independent grounds for its dismissal:

10 First, the Indirect Purchaser Plaintiffs have inserted additional details concerning
11 (a) Defendants' alleged participation in patent pools, and (b) allegations relating to pricing and
12 market effects. None of these additional allegations is sufficient to save the IP-FAC because they
13 point to nothing more than parallel conduct that is equally consistent with competition as with any
14 claimed conspiracy. Allegations of this sort no longer suffice under *Bell Atlantic Corp. v.*
15 *Twombly*, 550 U.S. 544 (2007).

16 *Second*, Indirect Purchasers lack Article III standing to assert claims under District of
17 Columbia, Hawaii, Nebraska, New Hampshire, and North Dakota law because no Indirect
18 Purchaser currently resides in or claims injury while residing in those states.

19 *Third*, Indirect Purchasers have not—and cannot—plead the required “antitrust standing”
20 because as purchasers of “ODD Products” only they are not participants in the relevant alleged
21 ODD market; any injuries they suffered are too remote from the alleged price fixing; and any
22 recovery based on purchases of finished products would be highly speculative, complex to
23 calculate, and duplicative of any recovery that an indirect purchaser of an ODD (whether alone
24 or in the form of a directly purchased finished product) would obtain. This test for antitrust
25 standing, first articulated in the seminal case of *Associated General Contractors of California*,

¹ For the sake of efficiency, this brief incorporates by reference the arguments from Defendants' Joint DP Motion and does not repeat them.

1 *Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) (“AGC”), dooms the
 2 majority of Indirect Purchasers’ state law claims.

3 *Fourth*, Indirect Purchasers plead a wildly broad “international” conspiracy to fix the
 4 price of ODDs but admit they have only purchased “ODD Products” that contain the allegedly
 5 price-fixed ODDs as one component of the finished goods. This fact, coupled with Indirect
 6 Purchasers’ failure to plead any facts about where or how these foreign-manufactured and
 7 foreign-sold ODDs were ultimately incorporated into ODD Products and then traveled through
 8 the chain of commerce, means that Indirect Purchasers have not met their burden of establishing
 9 jurisdiction under the Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a (“FTAIA”).
 10 This same jurisdictional bar applies to Indirect Purchasers’ state antitrust and consumer
 11 protection claims by virtue of the Commerce and Supremacy Clauses of the United States
 12 Constitution.

13 *Fifth*, Indirect Purchasers’ second and third causes of action fail because they cannot
 14 assert nationwide claims under California’s Cartwright Act and Unfair Competition Law, Cal.
 15 Bus. & Prof. Code §§ 16270, et seq., and 17200, et seq. Applying California law to the claims of
 16 purported class members across the country violates due process under the Supreme Court’s
 17 decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). *Shutts* precludes application
 18 of California law to the claims of non-California residents where: (1) California law and the laws
 19 of other states conflict; and (2) the claims of non-California residents lack “significant contact or
 20 aggregation of contacts” with California. That is the case here, and the nationwide claims under
 21 California law should be dismissed.

22 *Sixth*, several additional substantive flaws provide independent bases for dismissing
 23 many of Indirect Purchasers’ state law claims: (a) Indirect Purchasers have failed to plead a
 24 sufficient “nexus” to intrastate commerce, as is required under District of Columbia, Mississippi,
 25 Nevada, New York, North Carolina, Tennessee, West Virginia, and Wisconsin law; (b) Indirect
 26 Purchasers cannot assert claims that pre-date the *Illinois Brick* repealer statutes that permit them
 27 to sue in New Hampshire, Oregon, and Utah; (c) the Utah Plaintiff has not satisfied his pre-filing
 28 requirement of serving the Utah State Attorney General; (d) the Florida Plaintiff has not met the

1 pleading requirement under Florida's consumer protection law; (e) the New York Plaintiff has
 2 failed to plead misrepresentations that were both directed at the consumer and materially
 3 deceptive; and (f) South Carolina consumer protection claims cannot be brought as class actions.

4 The IP-FAC should be dismissed.

5 **II. BACKGROUND**

6 **A. The Parties**

7 The Indirect Purchaser Plaintiffs are a group of twenty-six individuals who reside in
 8 twenty-three different states and the District of Columbia,² and claim to have indirectly
 9 purchased an "ODD Product" for their own use and not for resale. (IP-FAC ¶¶ 14-38.) "ODD
 10 Products" is defined broadly to "include computers, videogame consoles, ODDs designated to be
 11 attached externally to devices such as computers (e.g., through a USB cable), CD
 12 players/recorders, DVD players/recorders and BD players-recorders." (*Id.* ¶ 6.).³ The IP-FAC
 13 does not identify which type of ODD Product any one of the Indirect Purchasers allegedly
 14 purchased, or from whom the purchase was made.

15 Defendants are twenty-two entities headquartered across Japan, South Korea, Taiwan and
 16 the United States, and each of whom the Indirect Purchasers allege "manufactured, sold, and
 17 distributed ODDs and ODD Products throughout the United States." (*Id.* ¶¶ 39-64.) Defendants
 18 encompass a wide variety of entities which compete in different potential markets, including
 19 markets for ODDs themselves and markets for different finished products which contain an ODD
 20 as a component. Consistent with this mixture of entities and products, Indirect Purchasers do not
 21 allege that all Defendants compete with each other. The IP-FAC also does not identify, as either
 22 a Defendant or putative co-conspirator, dozens of other entities that also sell ODD Products.

23
 24 ² There are two sets of putative class representative plaintiffs who purport to reside in Oregon
 and Massachusetts. (IP-FAC ¶¶ 21-22, 31.)

25
 26 ³ Unlike Direct Purchasers, the Indirect Purchasers define "ODD Products" to include only
 products containing ODDs, and not ODDs themselves. (*Compare* IP-FAC ¶ 6 with DP-CAC
 ¶ 3 (defining ODD Products as both ODDs and products containing ODDs).) Whereas the
 Direct Purchasers' pleading is undoubtedly designed to obscure the fact that they really are
 not direct purchasers at all, the Indirect Purchasers plainly do not allege that they purchased
 any ODDs, not even indirectly.

1 **B. Summary of Allegations**

2 Like the Direct Purchasers, the Indirect Purchasers purport to allege “an international
 3 conspiracy to fix the prices of Optical Disk Drives (“ODD”),” which Defendants accomplished
 4 through “customer allocations and rigged auction bidding for procurement contracts” to “some of
 5 the largest Original Equipment Manufacturers (“OEMs”) in the United States.” (IP-FAC ¶¶ 1-2.)
 6 This alleged conspiracy, ongoing “[s]ince at least 2004,” is claimed to be global in scope and
 7 facilitated by Defendants’ “rigging [of] electronic auctions conducted by the OEMs to award
 8 ODD supply contracts to Defendants.” (*Id.* ¶¶ 1, 3.) At times, the Indirect Purchasers plead
 9 inconsistently with references to “ODD Products” thrown into the scope of the conspiracy.⁴ Yet,
 10 similar to the failings of Direct Purchasers’ complaint, Indirect Purchasers plead no facts to
 11 actually substantiate those conclusory allegations.

12 Instead, the overwhelming majority of the IP-FAC is devoted to familiar boilerplate
 13 paragraphs alleging “specific characteristics of the ODD market [which] made it ripe for
 14 collusion” (*id.* at Section V., B.), and variously alleges the existence of (i) market concentration,
 15 (*id.* ¶¶ 84-87), (ii) barriers to entry, facilitated by the formation of patent pools, (*id.* ¶¶ 140-69),
 16 (iii) Defendants’ participation in collaborations, such as joint ventures, (*id.* ¶¶ 88-108), trade
 17 shows and standards-setting activities, (*id.* ¶¶ 170-200), (iv) Department of Justice (“DOJ”)
 18 subpoenas (alleged to have been issued to four of the twenty-two Defendants, (*id.* ¶¶ 243-47)),
 19 (v) alleged misconduct by certain Defendants in unrelated product markets (*id.* ¶¶ 257-76), and
 20 (vi) price trends (even though, admittedly, ODD prices have dropped throughout the putative
 21 class period), (*id.* ¶¶ 201-11). As with the Direct Purchaser Complaint (“DP-CAC”), the Indirect
 22 Purchasers include only a handful of facts purporting to describe isolated incidents of potential
 23 bid rigging in connection with two computer manufacturers (Dell Inc. and Hewlett-Packard) in

24

25 ⁴ Compare IP-FAC ¶¶ 1, 229 (“Defendants’ *conspiracy to raise, fix or maintain the price of*
 26 *ODDs at artificial levels resulted in harm to Indirect Purchaser Plaintiffs and the proposed*
 27 *classes because it resulted in them paying higher prices for ODD Products than they would*
have”) (emphasis added), *with id.* ¶¶ 314-315, 324 (“Defendants have combined and
 28 conspired to raise, fix, maintain or stabilize the prices of ODD Products sold in the United
 States”).

1 three ODD procurement auctions—each of which involved communications between no more
 2 than two Defendants, and purports to have included only four of the twenty-two Defendants. (*Id.*
 3 ¶¶ 131-39.) The Indirect Purchasers do not allege that these three unrelated auctions—which
 4 purportedly took place in August 2006, December 2008 and February 2009—share any common
 5 nexus, or that any Indirect Purchaser purchased an ODD or any type of ODD Product from either
 6 Dell or HP.

7 In sum, the IP-FAC’s allegations in support of the purported global conspiracy to fix
 8 prices on ODD Products largely mirror the DP-CAC with only two differences: the IP-FAC
 9 includes: (1) a longer description of the Indirect Purchasers’ patent pool allegations, (IP-FAC ¶¶
 10 146-56); and (2) citations to different pricing data and supposed market effects, (*id.* ¶¶ 201-228).
 11 Neither is sufficient to save the IP-FAC.

12 **III. LEGAL STANDARD**

13 Failure to State A Claim. Dismissal is appropriate when a complaint fails to allege
 14 “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570.
 15 In antitrust cases, courts must dismiss a complaint that alleges facts equally consistent with
 16 competition as with conspiracy. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir.
 17 2008) (“Allegations of facts that could just as easily suggest rational, legal business behavior by
 18 the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of
 19 the antitrust laws.”). These pleading standards apply not only to the Indirect Purchasers’ federal
 20 antitrust claim, but also to their state law claims. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, 1953
 21 (2009) (holding that the *Twombly* pleading standard applies “in all civil actions and proceedings
 22 in the United States district courts”) (internal quotations omitted); *see also In re Tamoxifen*
 23 *Citrate Antitrust Litig.*, 466 F.3d 187, 198-99 (2d Cir. 2006) (affirming dismissal of state law
 24 claims where plaintiffs failed to state a federal antitrust claim).

25 Lack of Subject Matter Jurisdiction. “[T]he party asserting subject matter jurisdiction has
 26 the burden of proving its existence.” *Rattlesnake Coal. v. E.P.A.*, 509 F.3d 1095, 1102, n. 1 (9th
 27 Cir. 2007); *United Phosphorous, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 946 (7th Cir. 2003)
 28 (affirming dismissal of claim on FTAIA grounds). “A complaint will be dismissed if, looking at

1 the complaint as a whole, it appears to lack federal jurisdiction either ‘facially’ or ‘factually.’”
 2 *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827 SI, 2010 U.S. Dist. LEXIS 65037,
 3 at *9-10 (N.D. Cal. June 28, 2010) (citation omitted) (finding no jurisdiction and granting motion
 4 to dismiss plaintiff’s claims based on foreign-sold LCD panels that were subsequently
 5 incorporated into its products).

6 **IV. ARGUMENT**

7 **A. Indirect Purchasers’ Complaint Fails to State a Claim**

8 Defendants have moved to dismiss the Direct Purchaser complaint (“DP-CAC”) because
 9 the Direct Purchasers (1) fail to plead facts in support of the alleged vast conspiracy to fix prices
 10 of ODDs and ODD Products sufficient to satisfy *Twombly*; and (2) lack standing, among other
 11 grounds. (*See* Joint DP Motion at Sections I, II, III, IV.) Aside from the few additional legally
 12 irrelevant allegations discussed below, the IP-FAC is essentially a carbon copy of the DP-CAC,
 13 and is deficient for the same reasons.⁵ This brief incorporates Defendants’ Joint Motion to
 14 Dismiss the DP-CAC by reference and does not repeat its *Twombly* and other arguments. This
 15 Section addresses the few allegations in the IP-FAC that were not included in the DP-CAC.
 16 These allegations, like the common allegations, are make-weight and fail to create a reasonable
 17 inference of a conspiracy.

18 **1. Indirects’ Patent Pool Allegations Do Not Support Their Claims.**

19 In support of their arguments that patent pools charge “discriminatory” royalties and
 20 facilitate “cartel monitoring,” (IP-FAC ¶¶ 140-69), the Indirect Purchasers offer a variety of
 21 allegations concerning the operation of a number of the patent pools that go beyond what the
 22 Direct Purchasers allege. For the most part, these allegations concern the history of the pools.

23 ⁵ Compare DP-CAC ¶¶ 114-180 with IP-FAC ¶¶ 84-111, 140-200 (alleging that the structure
 24 of the ODD/ODD Products industry “contributed to” or “facilitate[d]” a conspiracy because
 25 the industry was concentrated, included joint ventures, had barriers to entry (including patent
 26 pools) and that defendants had opportunities to conspire at trade association meetings);
 27 compare DP-CAC ¶¶ 236-244 with IP-FAC ¶¶ 201-217 (alleging that ODD prices stabilized
 over time); compare DP-CAC ¶¶ 181-199 with IP-FAC ¶¶ 259-266 (alleging that defendants
 have a “history of collusion,” citing the TFT-LCD, DRAM, and CRT investigations as
 alleged examples); compare DP-CAC ¶ 235 with IP-FAC ¶ 254 (quoting and bolding the
 same statement by Toshiba counsel).

1 (*See, e.g.*, IP-FAC ¶¶ 146-56.) None support the Indirect Purchasers’ claims nor suggest that
 2 there was any conspiratorial conduct. Rather, they describe features of the pools that were
 3 disclosed over a decade ago, and that the DOJ, the European Commission, and the courts have
 4 all found pose no anticompetitive threat.⁶

5 First, Indirect Purchasers aver that the CD-R and DVD patent pools facilitate conspiracy
 6 because they “license [their] patents externally in a discriminatory fashion; pool members … paid
 7 no royalties to other patent pool members for licensed products.” (*Id.* ¶ 144.)⁷ As a result,
 8 Indirect Purchasers say this “prohibitive royalty” deters market entry. (*Id.* ¶ 145.) Indirect
 9 Purchasers also claim that the DVD patent pools are anti-competitive because they do not share
 10 certain features of the MPEG patent pool. (*Id.* ¶ 154.) These allegations of “discrimination,”
 11 however, amount to nothing more than the charge that the patent holders pay either nothing or less
 12 than non-patent-holding licensees. This is not an antitrust violation, nor is it a fact that in any way
 13 supports the conclusory allegations of conspiracy. Cross-licensing is commonplace among patent
 14 holders. And as Indirect Purchasers themselves acknowledge, “setting a high royalty is not *per se*
 15 illegal.” (*Id.* ¶ 160.) While a high royalty may be a barrier to entry, it is not a sign of an anti-
 16 competitive conspiracy. On the contrary, the patent holders formed a pool and procompetitively
 17 expanded output by licensing the patents to third parties—the opposite of the output-reducing
 18 conspiracy plaintiffs imagine. The related allegation that royalties became “prohibitive” over time
 19 for non-patent-holder licensees relative to manufacturing costs and prices as costs and prices
 20 declined, (*Id.* ¶¶ 157-58), demonstrates not collusion, but rather intense competition weeding out
 21 higher-cost producers.⁸ Indirect Purchasers do not—and cannot—identify an obligation to index

22 ⁶ Given that the patent pools were publicly disclosed more than a decade ago via, among other
 23 things, DOJ business review letters, the time has long passed for any antitrust challenge to
 24 the structure or operation of the pools. *See, e.g.*, 15 U.S.C. § 15b (four-year statute of
 25 limitations); Kan. Stat. Ann. § 60-512 (three-year statute of limitations); Wisc. Stat. Ann. §
 26 133.18(2) (six-year statute of limitations).

27 ⁷ Unlike the Direct Purchasers, the Indirect Purchasers make no argument that the Blu-Ray
 28 patent pool was anticompetitive.

8 In any event, the DOJ’s Business Reviews noted that the DVD pools’ royalties—imposed as
 27 to patents that are complementary rather than representing competing technology—were
 28 originally “sufficiently small relative to the total costs of manufacture that it is unlikely to

1 royalties to manufacturing costs or prices so that royalties decline as costs or prices do.⁹ Nor do
 2 they allege that “good” patent pools apply royalties to manufacturing costs, or that it is practical or
 3 even plausible for pools to apply royalties to a licensee’s confidential internal costs.

4 Similarly, Indirect Purchasers’ allegation that requiring licensees to provide certain
 5 information facilitated “cartel monitoring,” describes only benign conduct that does not support
 6 their conspiracy claims. (*Id.* ¶¶ 162-64.) Indirect Purchasers allege that DVD patent pool
 7 licensees must report the quantities of products for which royalties are due, the identities of
 8 buyers, and the net selling price of DVD players (but not ODDs). (*Id.* ¶¶ 163-64.) Indirect
 9 Purchasers do not allege that these information sharing requirements applied to pool members
 10 (which comprise only a minority of the companies named as Defendants), but claim that the
 11 requirements permitted members to determine “whether one of the six conspirators who are also
 12 members of the patent pool must be cheating.” (*Id.* ¶ 162.) The conclusion cannot follow from
 13 the premise. If the information-sharing requirements applied *only* to non-members, they could
 14 not have facilitated “cartel monitoring” because they did not require any Defendant—patent pool
 15 members (who allegedly account for 95% of production, (*Id.* ¶ 162))—to share *any* information
 16 with each other. Indeed, requiring licensees to report this type of information has an obvious
 17 legitimate purpose: to enable patent holders to determine whether the proper amount of royalty
 18 has been paid and to verify the numbers submitted by licensees. Moreover, Indirect Purchasers
 19 never even allege that licensees were required to report anything more than units produced.
 20 Indirect Purchasers do not allege that Defendants had access to the type of product produced

21
 22 enable collusion.” (Dec. 16, 1998 DOJ Business Review, *available at*
 23 <http://www.justice.gov/atr/public/busreview/2121.htm> (reviewing DVD 3c patent pool); June
 24 10, 1999 DOJ Business Review Letter, *available at*
 25 <http://www.justice.gov/atr/public/busreview/2485.htm> (reviewing DVD 6c patent pool)
 26 (“Business Reviews”).) The Business Reviews also contradict plaintiffs’ claims that ODD
 27 patent pools’ licensing was “discriminatory,” as they note that the patent pool license
 28 agreements require the pools to “license on a *non-discriminatory basis* to all interested
 parties” and thus “cannot impose disadvantageous terms on competitors, let alone refuse to
 license to them altogether.” (Business Reviews (emphasis added).)

9 Moreover, given that marginal costs of producing ODDs tend to decline as volume increases,
 10 (as Indirect Purchasers acknowledge), linking royalty fees to production costs would so
 11 diminish royalties as to deter patent holders from investing in new products.

1 (e.g., DVD player, television with built-in DVD player, DVD Recorder, video game console),
 2 prices or costs—the critical information that Defendants would need to monitor ODD prices.¹⁰
 3 In sum, Indirect Purchasers have not alleged that the patent pools facilitated any anti-competitive
 4 “monitoring.”

5 Finally, Indirect Purchasers’ allegation that the DVD patent pools lack three handpicked
 6 features of another patent pool (the MPEG pool) is meaningless. (*Id.* ¶ 154.) The purported
 7 absence of three particular features does not suggest that the patent pools do not safeguard
 8 competition. Courts and the DOJ, considering all aspects of the patent pools—not just the three
 9 factors selected by Indirect Purchasers—have determined that they adequately safeguard
 10 competition. (*See* Joint DP Motion at Section II.C.; *see also* Business Reviews (finding pool
 11 administrators’ discretion to be limited, because they must license on a “non-discriminatory
 12 basis”).)¹¹

13 Indirect Purchasers’ tardy attempt to target these 10+ year old patent pools falls short, as
 14 they do not and cannot allege that the pools facilitated the purported conspiracy.

15 **2. Indirects’ Allegations of Market Effects Do Not Support Their Claims.**

16 Indirect Purchasers, like Direct Purchasers, claim that certain market data support their
 17 conspiracy theories. Despite the Indirect Purchasers’ attempt to dress up the same allegations in
 18 an array of tables, line charts, bar charts, and bubble charts, their allegations are just as empty as
 19 the Direct Purchasers’. And, like Direct Purchasers, Indirect Purchasers’ theory is based on
 20 inconclusive data, some of which are misrepresented, and ignores far more plausible,
 21 procompetitive explanations for that data. Indirect Purchasers argue that market data reveal two

22
 23 ¹⁰ The Business Reviews also recognized that the DVD patent pools’ licensee-reporting
 requirements were unlikely to facilitate collusion because patent pool members would have
 no access to licensees’ “competitively sensitive proprietary information, such as cost data.”

24
 25 ¹¹ Plaintiffs take issue with the fact that one member of the patent pool serves as administrator.
 The DOJ and the courts reviewing the pools were cognizant of this feature, which did not
 alter their overall analysis. Moreover, Plaintiffs’ perception that the MPEG pool is different
 from the DVD pools because it has “non-discriminatory” licensing terms is unfounded; the
 Business Reviews in fact noted that the DVD pools must license on a “non-discriminatory
 basis,” and that charging non-patent holders royalties is entirely permissible, as explained
 above.

1 alleged trends, each of which they say suggests a conspiracy: (1) that the rate of decline of
 2 prices slowed over time (the same argument made by the Direct Purchasers, but using different
 3 data); and (2) that the rate of technological innovation, measured by their own nonsensical
 4 metrics, declined. Neither supports a plausible inference of conspiracy.

5 a. The Alleged Decline in the Rate of Price Declines.

6 Indirect Purchasers offer three charts purporting to show the changing prices of ODDs
 7 and hard disk drives manufactured in Japan over time, claiming that these charts show that ODD
 8 prices stabilized while hard-disk drive prices continued to fall, supposedly indicating a price-
 9 fixing conspiracy. (IP-FAC ¶¶ 203-09.) The inference fails. The data do not support an
 10 inference of an industry-wide ODD conspiracy, and certainly not an even broader ODD Products
 11 conspiracy, if that is what Indirect Purchasers are trying to allege.

12 First, Indirect Purchasers' alleged data are inconclusive, inconsistent, and misrepresented.
 13 Indirect Purchasers rely on prices only of ODDs manufactured in Japan, but do not allege that
 14 Japanese manufacturing accounts for any meaningful proportion of ODD manufacturing and
 15 pricing overall. (*Id.* ¶ 203).¹² Other data show increasingly steep price declines from 2007 to
 16 2008, right in the middle of the alleged conspiracy. (*Id.* ¶ 211.) The comparison between ODDs
 17 and hard disk drives ("HDD") is an inconsequential diversion.¹³

18 But most egregious is Indirect Purchasers' claim that "price declines in ODDs not only
 19 came to a complete halt in 2008, but prices even increased substantially during the 2008 to 2009
 20 period." (*Id.* ¶ 208.) This allegation is disingenuous—the claim that prices rose does not reflect
 21 higher actual ODD prices, but is instead because of a rise in the value of the yen relative to the
 22 dollar. If the Indirect Purchasers had not converted the Bank of Japan's data from yen into

23 ¹² In fact, Indirect Purchasers allege that most of the Defendant ODD manufacturers delegated
 24 manufacturing to Taiwan or Korea. (IP-FAC ¶ 97 (PBDS); ¶ 100 (HLDS, TSST) ¶108
 25 (PLDS).)

26 ¹³ For example, Indirect Purchasers do not say whether there were equivalent introductions of
 27 new higher-priced HDD products, whether HDD may have faced greater competition from
 substitutes such as NAND flash memory, or whether HDD innovations permitting greater
 storage perhaps may have caused HDD prices to drop especially sharply (especially if those
 28 prices are measured per gigabyte of storage).

1 dollars, those data would show that prices (reported by the Bank of Japan in yen) continued to
 2 decline through the end of 2009. (*Id.* ¶ 209).¹⁴ This kind of legerdemain obviously provides no
 3 support as an allegation of conspiracy, and renders all of Indirect Purchasers' Bank of Japan
 4 data, (*id.* ¶¶ 205, 207, 209), meaningless.

5 Second, Indirect Purchasers' claim that a conspiracy must be behind the purported price
 6 stabilization ignores common-sense explanations for the trend. For example, any stabilization
 7 during 2008-2009 could be explained by the resolution of "vigorous competition" between the
 8 battling next-generation standards, HD-DVD and Blu-Ray, after the HD-DVD producers'
 9 decision to abandon HD-DVD, an allegedly lower-cost technology than Blu-Ray. (IP-FAC ¶¶
 10 213-17.) A lower-cost technology's exit from the market would of course push average prices
 11 up. More fundamentally, the Indirect Purchasers fail to acknowledge that price declines must at
 12 some point hit a floor (indeed, Indirect Purchasers fail to address at all the movement of
 13 component costs during this period); companies can only cut costs so much. Had the rate of
 14 price decline depicted in the early years of Indirect Purchasers' charts continued, companies
 15 would be charging *negative dollars* for these DVD and Blu-Ray players by now—that is, paying
 16 consumers to take their products. This, of course, makes no economic sense.

17 b. The Alleged Decrease In Technological Innovation.

18 Indirect Purchasers' allegations regarding a purported decrease in technological
 19 innovation also lack substance and are insufficient to state any claim. Indirect Purchasers allege
 20

21 ¹⁴ The analysis in the IP-FAC is based on Bank of Japan indexes, which measure prices in yen,
 22 converted into dollar terms (IP-FAC ¶ 203 ("These price indices can therefore be converted
 23 to a common currency basis (dollars), and be used as measures of price movements in global
 24 markets").) The yen strengthened substantially against the dollar from 2007-2009, from
 25 117.76 yen per dollar in 2007 to 103.39 yen per dollar in 2008 and 93.68 yen per dollar in
 26 2009 (the same period for which plaintiffs claim that ODD prices increased), according to the
 27 Federal Reserve. See <http://tokyo.usembassy.gov/e/acs/tacs-7126b.html>. As a result, because
 28 the value of yen increased by over 20% during this time period, any price decrease of under
 20% would appear as an *increase* when measured in terms of dollars, simply because yen
 would equate to an increased number of dollars over that time period, and the decrease in
 price in terms of yen would be outweighed by an increase in the number of dollars that yen
 would buy. As Plaintiffs allege that the price decreases in ODDs were well under 20% in the
 2004-2009 time period (IP-FAC ¶ 207), this shift in the exchange rate, for which Indirect
 Purchasers do not account, is more than enough to explain the slight uptick in their chart.

1 only that “reduced price competition resulting from a price-fixing conspiracy *may have* further
 2 reduced rates of technological innovation.” (IP-FAC ¶ 226 (emphasis added); *see also id.* ¶¶
 3 220-23 (charts purporting to show that new product introductions dwindled over time).) Their
 4 formulation—that conspiracy only “may have” reduced innovation—reveals that these
 5 allegations are speculation. Moreover, Indirect Purchasers have not alleged any plausible link
 6 between the alleged rate of new product innovations and their allegations of bid-rigging.

7 Even on their own terms, Indirect Purchasers’ data are also incomplete, and what data
 8 there are do not support Indirect Purchasers’ claims. There is no data measuring product
 9 introductions after 2007—the entire second half of the alleged six-year conspiracy.¹⁵ (*Id.* ¶¶
 10 220-23.) One chart even ends in 2004, excluding nearly all of the alleged conspiracy. (*Id.* ¶
 11 222.) Moreover, Indirect Purchasers allege that innovation declined *before* the supposed
 12 conspiracy began in 2004. (IP-FAC ¶ 220 (“the absence of major new innovations with an
 13 impact on the industry since 2002”), ¶ 222 (“noticeable reduction in the number of relevant new
 14 patents issued in all technology areas after 2001”).) When plaintiffs cannot show any contrast
 15 with an appropriate competitive benchmark, the data cannot be used to show conspiracy. *See In*
 16 *re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1022 (N.D. Cal. 2007)
 17 (“GPU”) (comparing data before and after the alleged conspiracy necessary to show unnatural
 18 market behavior). Indirect Purchasers cannot even show an allegedly declining rate of
 19 innovation within the alleged conspiracy period.¹⁶ Finally, Indirect Purchasers’ metrics are
 20 ultimately meaningless. Indirect Purchasers rely heavily on charts that measure the introduction
 21 of competing *formats*, such as DVD+R and DVD-R, which necessarily narrowed based on
 22 market acceptance as ODDs matured, and ignore the introduction of new products within those
 23 standards, such as new types of DVD and CD disk drives that were, for example, faster, quieter,

24
 25¹⁵ For example, the chart at IP-FAC ¶ 222 has differently-sized bubbles with no explanation of
 what bubble size means.

26¹⁶ The chart for Blu-Ray shows that the number of filed patents for Blu-Ray peaked during
 27 2003 and 2004 (in other words, during the first year of the conspiracy), and then dropped.
 (IP-FAC ¶ 223.) The chart for HD-DVD actually shows that the number of patents doubled
 from 2005 to 2006, right in the middle of the conspiracy. (*Id.*)

1 slimmer, held more capacity (dual layers, (IP-FAC ¶ 74)), or more energy-efficient, (*Id.* ¶ 220-
 2 21.). These charts do not show that the rate of new product introductions declined.

3 Even if the rate of new product introductions slowed, independent explanations abound.
 4 It is natural that fewer patents would be filed for over time as a product matures. Indirect
 5 Purchasers' charts show that the number of patents fell off after Blu-Ray and HD-DVD were
 6 introduced to the market. (IP-FAC ¶ 223.)¹⁷ Indirect Purchasers offer no allegations that would
 7 displace the most obvious, rational explanation for why this occurred: technology companies
 8 independently chose to focus their resources on new generations of technology, rather than to
 9 what were likely to be marginal improvements in mature technologies. These allegations are just
 10 as consistent with independent action as with conspiracy and are insufficient to state a claim
 11 under *Twombly*. 550 U.S. at 553-554.

12 Indirect Purchasers' claims of reduced innovation do not suggest the existence of any
 13 conspiracy and do not save their claims from dismissal.¹⁸

14 **B. Indirect Purchasers Lack Article III Standing to Sue in States Where No**
 15 **Indirect Purchaser Resides or Claims Injury (District of Columbia, Hawaii,**
 16 **Nebraska, New Hampshire and North Dakota).**

17 No Indirect Purchaser Plaintiff either resides in or is alleged to have indirectly purchased
 18 an ODD Product while residing in the District of Columbia, Hawaii, Nebraska, New Hampshire
 19 or North Dakota. Accordingly, Indirect Purchasers lack Article III standing to sue for either
 20 antitrust or consumer protection violations under those states' laws. *See In re Flash Memory*
 21 *Antitrust Litig.*, 643 F. Supp. 2d 1133, 1164 (N.D. Cal. 2009) ("Flash") ("Where, as here, a
 22 representative plaintiff is lacking for a particular state, all claims based on *that* state's laws are
 23 subject to dismissal.") (emphasis in original); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907,

24 ¹⁷ Plaintiffs allege that Blu-Ray was introduced in 2003 and that HD-DVD was introduced in
 25 2006. (IP-FAC ¶ 221.) It is hardly surprising, then, that the number of Blu-Ray patents
 26 declined after 2004, and HD-DVD patents fell off after 2006. (*Id.* ¶ 223.)

27 ¹⁸ Moreover, to the extent that Plaintiffs have alleged a restraint in the market for innovation,
 28 they allege no specific facts suggesting any restraint. In addition, as consumers, they do not
 29 participate in the market for innovation, and lack proof of injury and causation based on
 30 research and development's uncertain results. (Herbert Hovenkamp, *et al.*, *IP & Antitrust* §
 31 4.3d (2009).)

1 924 (N.D. Ill. 2009) (“Indirect Purchaser Plaintiffs fail to satisfy their burden of showing Article
 2 III standing for states where they do not reside.”); *Pecover v. Elec. Arts Inc.*, 633 F. Supp. 2d
 3 976, 984 (N.D. Cal. 2009) (“The named plaintiffs in this action purchased the video game at
 4 issue in California and the District of Columbia and have alleged no basis for standing to bring
 5 claims under the laws of other states.”). Accordingly, Indirect Purchasers’ claims under District
 6 of Columbia, Hawaii, Nebraska, New Hampshire, and North Dakota law should be dismissed.

7 **C. As Purchasers of Finished Products Containing the Allegedly Price-Fixed**
 8 **ODDs, Indirect Purchasers Lack Antitrust Standing.**

9 Even if the Indirect Purchasers had sufficiently pled a conspiracy, they have failed to
 10 carry their burden to plead facts demonstrating that they possess antitrust standing. *See AGC*,
 11 459 U.S. at 535. Antitrust standing is separate and distinct from Article III standing—even if an
 12 antitrust plaintiff demonstrates injury-in-fact, courts must still determine whether the plaintiff is
 13 a proper party to bring a private antitrust action. *See id.* at 535 n.31.

14 **1. The AGC Multi-Factor Test for Antitrust Standing Applies to the**
 15 **Majority of Indirect Purchasers’ State Law Claims.**

16 In *AGC*, the Supreme Court instructed courts to take a multi-factor balancing approach to
 17 determine whether a plaintiff has antitrust standing. *Id.* at 537-44. The Ninth Circuit has
 18 embraced *AGC* and has articulated the factors as: (1) the nature of the plaintiffs’ injury; (2) the
 19 directness of the injury; (3) the speculative nature of the harm; (4) the risk of duplicative
 20 recovery; and (5) the complexity in apportioning damages. *Lucas v. Automotive Eng., Inc. v.*
 21 *Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1232 (9th Cir. 1998). While *AGC* addressed
 22 antitrust standing under federal law, courts in California, the District of Columbia, Iowa, Kansas,
 23 Maine, Michigan, North Dakota, Vermont and Wisconsin have expressly adopted and applied
 24 the *AGC* test as a pre-requisite for standing under their state antitrust laws.¹⁹ Additionally,

25 ¹⁹ The states that expressly follow *AGC* are: (1) California, *Vinci v. Waste Mgmt., Inc.*, 36 Cal.
 26 App. 4th 1811, 1814 (1995); (2) D.C., *In re Vitamins Antitrust Litig.*, No. 99-197, 2001 U.S.
 27 Dist. LEXIS 8903, at *26-27 (D.D.C. June 7, 2001); (3) Iowa, *Southard v. Visa U.S.A. Inc.*,
 28 734 N.W. 2d 192, 198 (Iowa 2007); (4) Kansas, *Shepherd v. Boeing Co.*, No. 07-2208-CM,
 2008 WL 360580, at *3 (D. Kan. Feb. 8, 2008); (5) Maine, *Knowles v. Visa U.S.A., Inc.*, No.
 Civ. A CV-03-707, 2004 WL 2475284, at *4-5 (Me. Super. Ct. Oct. 20, 2004); (6) Michigan,
Stark v. Visa U.S.A., Inc., No. 03-055030, 2004 WL 1879003, at *4 (Mich. Cir. Ct. July 23,

1 Nebraska and New York have expressly applied *AGC* as the standing requirement applicable to
 2 their state consumer protection laws, in addition to their state antitrust laws.²⁰ Finally, federal
 3 courts applying Arizona, Mississippi, Nevada, New Mexico, South Dakota, Utah, West Virginia
 4 and Wisconsin laws have applied *AGC* to those states' antitrust laws based on those states'
 5 harmonization statutes, which instruct courts to look to federal antitrust authorities in the absence
 6 of controlling state authorities.²¹

7 **2. Indirect Purchasers Have Not (and Cannot) Allege Facts Sufficient To**
 8 **Establish Antitrust Standing Under AGC.**

9 As set forth below, the fact that Indirect Purchasers have indirectly purchased only ODD
 10 *Products* (IP-FAC ¶ 5)—which simply contain the allegedly price-fixed ODD as one of countless
 11 other components in the finished goods that they indirectly purchased—is fatal to their ability to
 12 plead antitrust standing.

13

14 2004); (7) North Dakota, *Beckler v. Visa U.S.A., Inc.*, No. 09-04-C-000030, 2004 WL
 15 2115144, at *3 (N.D. Dist. Ct. Aug. 23, 2004); (8) Vermont, *Fucile v. Visa U.S.A., Inc.*, No.
 16 S1560-03, 2004 WL 3030037, at *2-3 (Vt. Super. Ct. Dec. 27, 2004); and (9) Wisconsin,
 17 *Strang v. Visa U.S.A. Inc.*, No. S1560-03, 2005 WL 1403769, at *3 (Wis. Cir. Ct. Feb. 8,
 18 2005).

19 ²⁰ The states that apply *AGC* to both state antitrust and consumer protection claims are: (1)
 20 Nebraska, *Kanne v. Visa U.S.A., Inc.*, 723 N.W.2d 293, 301-02 (Neb. 2006); and (2) New
 21 York, *Ho v. Visa U.S.A., Inc.*, 793 N.Y.S.2d 8, 8-9 (NY App. Div. 2005) (affirming dismissal
 22 of indirect purchaser claims for lack of standing under the *AGC* test in *Ho v. Visa U.S.A. Inc.*,
 23 787 N.Y.S.2d 677, 2004 WL 1118534, at *3 (N.Y. Sup. April 21, 2004)); *State ex rel. Spitzer*
 24 *v. Daicel Chem. Indus. Ltd.*, 42 A.D.3d 301, 303-304 (N.Y. App. Div. 2007); *In re Dynamic*
 25 *Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1142 (N.D. Cal.
 26 2008) (“*DRAM II*”).

27 ²¹ The states where federal courts have applied *AGC*, including based on harmonization
 28 statutes, are: (1) Arizona, *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*,
 1 516 F. Supp. 2d 1072, 1095 (N.D. Cal. 2007) (“*DRAM I*”); Ariz. Rev. Stat. § 44-1412; (2)
 2 Mississippi, *DRAM I*, 516 F. Supp. 2d at 1095 (citing *Harrah's Vicksburg Corp. v.*
 3 *Pennebaker*, 812 So. 2d 163 (Miss. 2001)); (3) Nevada, *DRAM I*, 516 F. Supp. 2d at 1095;
 4 Nev. Rev. Stat. § 598A.050; (4) New Mexico, *DRAM I*, 516 F. Supp. 2d at 1095; N.M. Stat.
 5 Ann. § 57-1-15; (5) South Dakota, *DRAM I*, 516 F. Supp. 2d at 1094 (citing *Cornelison v.*
 6 *Visa U.S.A., Inc.*, No. CIV 03-1350 (S.D. Cir. Ct. Sept. 29, 2004)); (6) Utah, Utah Code Ann.
 7 § 76-10-926 (2010); *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 804-805 (D. Utah
 8 1988); (7) West Virginia, *DRAM II*, 536 F. Supp. at 1142; W. Va. Code § 47-18-16; and (8)
 9 Wisconsin, *In re G-Fees Antitrust Litig.*, 584 F. Supp. 2d 26, 41-42 (D.D.C. 2008); *DRAM*,
 10 516 F. Supp. 2d at 1094; *In re Intel Corp. Microprocessor Antitrust Litig.*, 496 F. Supp. 2d
 11 404, 409 (D. Del. 2007).

a. Indirect Purchasers Cannot Plead “Antitrust Injury” Because They Were Not Participants in the Relevant Market of Allegedly Price-Fixed ODDS.

The first AGC factor looks at the nature of the plaintiff's injury and asks whether it is the type of injury that the antitrust laws were intended to prevent; this is commonly referred to as "antitrust injury" and is the factor that is given "great weight" by the courts. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co.*, 190 F.3d 1051, 1055 (9th Cir. 1999). Indeed, as the Supreme Court has observed, a plaintiff cannot have antitrust standing without antitrust injury. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 n.5 (1986) ("A showing of antitrust injury is necessary, but not always sufficient, to establish standing."). Because the antitrust laws were created to "protect[] the economic freedom of participants in the *relevant market*," AGC, 459 U.S. at 538 (emphasis added), "the injured party [must] be a participant in the same market as the alleged malefactors" to establish an antitrust injury, *R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 148 (9th Cir. 1989). "'Parties whose injuries, though flowing from that which makes the defendant's conduct unlawful, are experienced in another market do not suffer antitrust injury.'" *Lorenzo v. Qualcomm, Inc.*, 603 F. Supp. 2d 1291, 1300 (S.D. Cal. 2009) (quoting *Am. Ad Mgmt., Inc.*, 190 F.3d at 1057). A "narrow exception" to the market participant requirement exists "for parties whose injuries are 'inextricably intertwined' with the injuries of market participants" *Id.*

An ODD is not in the same market as a computer, television, camcorder, or video-game console. Indirect Purchasers have alleged only that they participated in the ODD Products market; they have not alleged that they participated in the market where the isolated alleged incidents of bid-rigging occurred (*i.e.*, the ODD market). In *DRAM II*, the court addressed the same type of claim presented here. 536 F. Supp. 2d at 1141. The plaintiffs alleged that the defendants had conspired to fix the price of DRAM, a component in computers that they had purchased. The court held that indirect-purchaser plaintiffs who had purchased computers containing DRAM – but not DRAM itself – lacked standing, even though the markets in which they purchased products were “interlinked” with the DRAM market. *See id.* at 1141-42.

1 As in *DRAM II*, any injury Indirect Purchasers here allegedly suffered, whether they
 2 purchased a computer, a television or a game system, occurred in the secondary markets for
 3 products *containing* ODDs, not in the ODD market itself, and only after the ODD was
 4 incorporated or transformed into something altogether different. With an earlier ruling, the
 5 *DRAM* court observed that “plaintiffs who are purchasing products in which DRAM is a
 6 component, rather than DRAM itself, are participating in a secondary market that is incidental to
 7 the primary price-fixed market (i.e., the market for DRAM modules themselves).” *In re*
 8 *Dynamic Access Memory (DRAM) Antitrust Litig.*, 516 F. Supp. 2d at 1091 (N.D. Cal. 2007)
 9 (*DRAM I*). The same is true here: each Indirect Purchaser participates in only one of the
 10 numerous downstream secondary markets for products, such as computers, of which ODDs are
 11 but one component. Indirect Purchasers are thus not market participants in the ODD market and
 12 lack standing to sue.

13 The Ninth Circuit has specifically held that plaintiffs and defendants participate in the
 14 same market for purposes of an AGC analysis only if the products or services at issue are
 15 reasonably interchangeable or have cross-elastic demand. *See Bhan v. NME Hosps., Inc.*, 772
 16 F.2d 1467, 1470-71 (9th Cir. 1985). ODD Products, such as televisions, computers, or
 17 camcorders, are not interchangeable with ODDs. Nor have Indirect Purchasers alleged any cross-
 18 elasticity of demand between such products and ODDs. Instead, each “Plaintiff’s allegations
 19 center on its injury in the secondary market, even though [each] Plaintiff attempts to convert
 20 spillover effects in the secondary market into an injury in the primary market.” *Datel Holdings,*
 21 *Ltd. v. Microsoft Corp.*, No. C-09-05535, 2010 WL 1691790, at *17 (N.D. Cal. Apr. 23, 2010).

22 Moreover, purchases of ODD Products do not confer standing to sue for a conspiracy to
 23 fix the prices of ODDs under the “inextricably intertwined” exception to the relevant market
 24 requirement. This exception applies where the injury to the plaintiff is “necessary for the
 25 creation or implementation of the trade restraining scheme.” *Id.*, at *16. Injury to end
 26 purchasers of finished ODD Products is not a necessary step in a scheme to fix the prices of
 27 ODDs. Such a scheme could succeed irrespective of whether inflated ODD prices were passed
 28 on to purchasers of ODD Products. *See Lorenzo*, 603 F. Supp. 2d at 1301 (holding that “the

² simple invocation of the phrase ‘inextricably intertwined’ will not allow a plaintiff to avoid the ‘fundamental requirement’ of antitrust injury) (citation and brackets omitted).

b. Indirect Purchasers' Alleged Injuries From Purchases of ODD Products Are Too Remote and Indirect.

Indirect Purchasers’ alleged injuries are also too remote and attenuated to satisfy the second AGC factor. In analyzing remoteness, courts look “to the chain of causation between [Indirect Purchasers’] injury and the alleged restraint in the [alleged] market” to determine whether the alleged injury is too remote to confer antitrust standing. *DRAM I*, 516 F. Supp. 2d at 1091 (citations omitted); see also *R.C. Dick Geothermal Corp.*, 890 F.2d at 147. “[V]aguely defined links” in the chain of causation are insufficient to establish the directness of the injury. *AGC*, 459 U.S. at 540.

These Indirect Purchasers’ purchases are even more remote than the ones that were held insufficient to confer standing in *DRAM I* and *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907 (N.D. Ill. 2009). In those cases, the indirect plaintiffs purchased products containing the allegedly price-fixed item (DRAM and potash) as a component of a finished product (computers and fertilizer, respectively) from direct customers of the alleged conspirators. Here, Indirect Purchasers have purchased even that finished product only indirectly – from customers of the alleged conspirators’ customers – inserting another layer of remoteness between them and the alleged price-fixing of ODDs. And, by their own definition, Indirect Purchasers could not have directly purchased any products from HP and Dell, the only two companies who Indirect Purchasers allege purchased any products subject to alleged bid-rigging.²²

In any event, the causal connection between Indirect Purchasers' alleged injuries and Defendants' purported wrongdoing is even more attenuated than even the inadequate finished-product purchases in *DRAM I* and *Potash*. Many layers—including finished-product

²² If anything, purchases of computers from HP and Dell would be direct purchases of finished products containing ODDs as a component (and indirect purchases of ODDs themselves), not indirect purchases of ODD Products – the purchases which Indirect Purchasers allege they have made. This is yet another example of the confusion bred by both plaintiff classes' contorted use of the term "ODD Products."

1 manufacturing and distribution—separate Indirect Purchasers’ allegations of injury stemming
2 from purchases of ODD Products from alleged constraints in the sale of ODDs themselves.
3 Moreover, the inconsistent definitions of their purchases that Indirect Purchasers provide, coupled
4 with their failure to specify any products they purchased from any Defendant, renders the chain of
5 causation even more “vaguely defined.” (*Compare* IP-FAC ¶ 5 with ¶¶ 14-38); AGC, 459 U.S. at
6 540. The remoteness of Indirect Purchasers’ claimed injuries defeats standing here.

c. Indirect Purchasers' Injury Claims Are Inherently Speculative, Would Be Unreasonably Complex, and Are Likely Duplicative.

As in *AGC*, Indirect Purchasers’ claim rests on a “speculative measure of harm.” *AGC*, 459 U.S. at 543 (internal citations and quotes omitted). Claims based on the prices of ODD Products also create “the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other.” *Id.* The “strong interest” in “keeping the scope of complex antitrust trials within judicially manageable limits” militates against blessing the wide-ranging finished products conspiracy that Indirect Purchasers have alleged by permitting these purchasers of ODD Products to sue. *Id.*

The problem of speculative damages claims is particularly relevant here “in view of the fact that the plaintiffs in question purchased their [ODD] in the form of a component product.” *DRAM I*, 516 F. Supp. 2d at 1092. That is because a variety of factors, such as the cost of other components and manufacturing and competition in the finished ODD product markets, influenced the price that each Indirect paid for the ODD Product, especially a product as complex as a laptop computer, whose price is also determined by its processor, software, visual display panel, hard drive and memory, among other things. Each product in which an ODD is merely a component “contains numerous other components, all of which *collectively* determine the final price actually paid by plaintiffs for the final product.” *Id.* (emphasis in original). Moreover, accounting for the wide variety of products and market participants in the transactions that yield ODD Products, measuring any alleged overcharge contained in each different product, and attributing any overcharge to ODDs, as opposed to other components, would be a highly complex process that

1 threatens to produce only speculative results.²³ Based on this reasoning, the court in *Lorenzo*
 2 dismissed indirect purchaser claims for lack of antitrust standing. 603 F. Supp. 2d at 1301. Here,
 3 because the Indirect Purchasers purchased ODD Products only indirectly, their damages require
 4 yet another level of calculations to account for the additional layer of pass-through. Under these
 5 circumstances, Indirect Purchasers could, at best, show only a theoretical link between any alleged
 6 overcharge for ODDs and the prices they paid for a different downstream product.

7 Moreover, those highly complex, speculative calculations are particularly unwarranted
 8 given that damages flowing from indirect purchases of ODD Products are duplicative of any
 9 damages available for indirect purchasers of ODDs, the products allegedly involved in the online
 10 Dell and HP auctions. A lawsuit involving parallel claims by indirect purchasers of ODDs (who
 11 may have resold the ODDs as a component of finished products to the plaintiffs) and indirect
 12 purchasers of products containing ODDs will produce redundant results because both parties
 13 could claim damages based on overcharges of the same product, the ODDs.²⁴

14 Indirect Purchasers have failed to satisfy their pleading burden to establish that they
 15 purchased optical disk drives. Their alleged “ODD Products” purchases do not confer standing,
 16 and their claims must be dismissed.

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²³ Factors that would further complicate the analysis, include, for example, whether any alleged
 21 overcharge was necessarily passed down (if at all) uniformly; the bargaining power of the
 22 parties; the effect of geographic discrepancies on pricing; discounts, rebates, and additional
 23 services offered by ODD manufacturers and ODD Products manufacturers and/or retailers;
 24 and the other costs and components in the manufacture of the derivative products (e.g., LCD
 screens, cathode ray tubes used in televisions, or SRAM, DRAM, or flash memory in a
 computer). See, e.g., AGC, 459 U.S. at 545 n.51 (internal citations and quotes omitted) (“the
 task of disentangling overlapping damages claims is not lightly to be imposed upon potential
 antitrust litigants, or upon the judicial system”).

²⁴ For example, if BestBuy purchased a laptop from HP containing an ODD manufactured by a
 25 Defendant (or purchased an ODD Product manufactured by a Defendant), BestBuy would be
 26 an indirect purchaser of ODDs. A Plaintiff who purchased that same laptop at Best Buy
 27 would receive a duplicative recovery. BestBuy would be the better plaintiff here because its
 28 purchase is closer to the actual manufacture of ODDs.

1 **D. Indirect Purchasers' Claims Also Must be Dismissed for Lack of Subject**
 2 **Matter Jurisdiction.**

3 As discussed in the companion Motion to Dismiss filed in the Direct Purchaser case, the
 4 FTAIA applies to Indirect Purchasers' claim for injunctive relief under Section 1 of the Sherman
 5 Act. (Joint DP Motion at Section V.) Indeed, Indirect Purchasers' inability to plead how the
 6 alleged "international" conspiracy had "direct, substantial, and reasonably foreseeable effects on
 7 U.S. commerce" is even clearer because of the more attenuated and speculative nature of Indirect
 8 Purchasers' claimed injuries. Similarly, this Court should dismiss Indirect Purchasers' various
 9 state antitrust and consumer protection claims because applying those states' laws to foreign
 10 commerce in a manner inconsistent with the FTAIA would violate the Commerce and
 11 Supremacy Clauses of the Constitution. *See In re Intel Microprocessor Antitrust Litig.*, 476 F.
 12 Supp. 2d 452, 457 (D. Del. 2007) (dismissing class plaintiffs' state law claims because "the
 13 Court is persuaded that Congress' intent would be subverted if state antitrust laws were
 14 interpreted to reach conduct which the federal law could not").

15 **1. Indirect Purchasers Have Even Less Basis to Claim Jurisdiction
 16 Under the FTAIA Because of the Indirect and Speculative Nature of
 17 Their Claims.**

18 The failures in pleading that defeat subject matter jurisdiction over Directs' claims are
 19 equally applicable to Indirect Purchasers' claims. The FTAIA requires a "direct, substantial and
 20 reasonably foreseeable" effect on U.S. commerce; but like the Direct Purchasers, the Indirect
 21 Purchasers allege neither where the claimed ODD price fixing occurred, or where or how the
 22 allegedly price-fixed ODDs were sold, distributed or incorporated into finished ODD Products.
 23 And, as indirect purchasers who are at least one step further removed from the alleged ODD
 24 price-fixing, the Indirect Purchasers must—but fail to—allege facts about the second
 25 international chain of distribution and manufacturing that the ODD Products traveled through
 26 before eventually being purchased by them in the United States. Emphasizing the added
 27 speculative and inherently indirect nature of component-based claims, such as those alleged here,
 28 several courts have found the FTAIA to bar indirect purchaser claims. As one court observed:
 "The FTAIA explicitly bars antitrust actions alleging restraints in foreign markets for inputs . . .

1 that are used abroad to manufacture downstream products . . . that may later be imported into the
 2 United States. Clearly, the domestic effects in such a case, if any, would obviously not be
 3 ‘direct,’ much less ‘substantial’ and ‘reasonably foreseeable.’” *United Phosphorus, Ltd. v.*
 4 *Angus Chem. Co.*, 131 F. Supp. 2d 1003, 1014 (N.D. Ill. 2001). *See also In re Intel*, 476 F.
 5 Supp. 2d at 456 (“That this speculative chain of events is insufficient to create the direct,
 6 substantial and foreseeable effects on commerce required by the FTAIA has been confirmed by
 7 other courts who have considered similar allegations concerning the downstream effects on
 8 commerce of component products.”). The same result should apply here and warrants dismissal
 9 of the IP-FAC.

10 **2. Indirect Purchasers’ State Law Claims Should Also Be Dismissed For
 11 Lack Of Jurisdiction.**

12 In adopting the FTAIA, Congress intended to set boundaries on the geographic reach of
 13 American antitrust laws. Preemption by the Commerce and Supremacy Clauses, not to mention
 14 international comity, require that this Court apply the same jurisdictional test set by Congress in
 15 the FTAIA to Indirect Purchasers’ state law claims as well. Indeed, to allow state laws to
 16 regulate where the FTAIA does not permit the Sherman Act to go, would lead to the absurd
 17 result of imposing more than twenty state antitrust laws on wholly foreign transactions. As the
 18 *Intel* court observed: “Congress’ intent would be subverted if state antitrust laws were
 19 interpreted to reach conduct which the federal law could not.” *Id.* at 457. This reasoning was
 20 rightly based on the Supreme Court’s recognition that “[f]oreign commerce is pre-eminently a
 21 matter of national concern,’ and therefore, it is important for the Federal Government to speak
 22 with a single, unified voice.” *Id.* (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S.
 23 434, 448 (1979)). For all of the reasons that Indirect Purchasers have not pled jurisdiction under
 24 the FTAIA, their state law claims must also be dismissed.

25 **E. Indirect Purchasers’ Attempt to Impose California State Law on a Putative
 26 Nationwide Class is Unconstitutional**

27 Indirect Purchasers’ second and third causes of action should be dismissed because they
 28 have not—and cannot—meet the Supreme Court’s *Shutts* test to justify applying California law
 to the claims of absent class members from 50 states. *See In re SRAM*, 580 F. Supp. 2d 896, 905

1 (2008) (dismissing California Cartwright Act and Unfair Competition claims asserted on behalf
 2 of non-California plaintiffs); *GPU*, 527 F. Supp. 2d at 1027-28 (citing *Shutts* in dismissing
 3 California causes of action).

4 In *Shutts*, the Supreme Court held that the application of Kansas law to the claims of
 5 plaintiffs in a nationwide class who were not from Kansas violated the defendants' due process
 6 rights because: (1) applying Kansas law would yield a different outcome than would otherwise
 7 result if the non-resident plaintiffs brought their claims in their states of residence, and (2) the
 8 absence of the non-resident plaintiffs' connection to Kansas meant the parties had no reason to
 9 believe that Kansas law would control their conduct. Thus, before a nationwide class can invoke
 10 the law of a particular state under *Shutts*, that state's law must both: (1) not conflict with the law
 11 of another jurisdiction that has an interest in the case, and (2) "have a 'significant contact or
 12 significant aggregation of contacts' to the claims asserted by each member of the plaintiff class,
 13 'contacts creating state interests,' in order to ensure that the choice of [the forum state's] law is
 14 not arbitrary or unfair." *Shutts*, 472 U.S. at 821-822. As discussed below, the IP-FAC fails on
 15 both scores.

16 First, there are substantial conflicts among the antitrust and consumer laws of the various
 17 states. As the *GPU* court recognized, California law is in direct conflict with the antitrust laws
 18 of more than half of all states, many of which preclude indirect purchasers from bringing a
 19 private claim at all. *GPU*, 527 F. Supp. 2d at 1027-28. Some of those states, unlike California,
 20 permit indirect purchaser suits for antitrust violations to be brought only by the Attorney General
 21 of that state, while other states have chosen to limit the damages in indirect purchaser suits to
 22 restitution or injunctive relief. *Id.* These conflicts are material and irreconcilable. Similarly,
 23 courts have recognized that "state consumer-protection laws vary considerably, and courts must
 24 respect these differences rather than apply one state's law to sales in other states with different
 25 rules." *Lantz v. Am. Honda Motor Co.*, No. 06 C 5932, 2007 U.S. Dist. Lexis 34948, at *11
 26 (N.D. Ill. May 14, 2007) (citation omitted) (denying nationwide class under § 17200); *see also*
 27 *Tidwell v. Thor Industries*, No. 05-CV-2088-L(BLM), 2007 U.S. Dist. Lexis 21819, at *23-24
 28 (S.D. Cal. Mar. 26, 2007) (denying nationwide class under California consumer protection law

1 and rejecting outright plaintiffs' contention that "there is no material variance in the state
2 consumer protection laws.").

3 Second, California’s contacts with the claims of out-of-state residents are insufficient to
4 justify the imposition of California’s antitrust and consumer protection laws on a nationwide
5 basis. Indeed, Indirect Purchasers do not even attempt to allege that anyone other than the
6 California Plaintiffs or the California Indirect Purchaser Class suffered injury in California. (IP-
7 FAC ¶¶ 14-38.) Finally, Indirect Purchasers’ conclusory allegations that *Defendants* supposedly
8 conduct substantial business in California and have availed themselves of California law is
9 irrelevant to the issue of California’s contacts with the absent class *Plaintiffs* in states outside of
10 California. Rather, “*each member of the Plaintiff class*” must demonstrate their claims have
11 sufficient contacts with California before California law can be invoked. *See Norwest Mortgage,*
12 *Inc. v. Superior Ct.*, 72 Cal. App. 4th 214, 225 (1999) (emphasis in original) (rejecting argument
13 that defendant’s presence in California was sufficient to justify application of California’s UCL,
14 Cal. Bus. & Prof. Code § 17200, to non-residents’ claims).

15 Indirect Purchasers cannot overcome the material conflicts between California antitrust
16 and consumer protection laws and the laws of the other 49 states. Nor have they pled sufficient
17 contacts between California and the out-of-state residents to justify imposing California law on
18 their claims. Indirect Purchasers' second and third causes of action should be dismissed.

F. Many Individual State Claims are Additionally Flawed.

20 Beyond the implausibility of the ODD Products conspiracy that has been pled, or the
21 standing and jurisdictional defects in their claims, many of Indirect Purchasers' individual state
22 law claims should be dismissed and/or limited because of several fundamental failures to plead
23 all of the elements and pre-requisites of the claims asserted.

1. Failure To Plead A Sufficient “Nexus” or “Substantial Effect” on *Intrastate Commerce* (District of Columbia, Mississippi, Nevada, New York, North Carolina, South Dakota, Tennessee, West Virginia, and Wisconsin Antitrust Claims).

26 Indirect Purchasers have failed to plead a sufficient “nexus” to or “substantial effect”
27 from Defendants’ alleged anticompetitive conduct and *intrastate* commerce. In other words,

1 they have not pled a conspiracy that occurred wholly within those states. This is fatal to their
 2 state antitrust claims in: (1) the District of Columbia, *Sun Dun, Inc. v. Coca-Cola Co.*, 740 F.
 3 Supp. 381, 396 (D. Md. 1990) (“[I]t clearly would be unconstitutional under the Commerce
 4 Clause to apply the D.C. Code to claims which, though bearing some connection to the District
 5 of Columbia, are in fact interstate in nature and are thus regulated by federal antitrust
 6 provisions.”) (citations omitted); (2) Mississippi, *In re Microsoft Corp. Antitrust Litig.*, No. MDL
 7 1332, 2003 WL 22070561, at *2 (D. Md. Aug. 22, 2003) (dismissing Mississippi antitrust claims
 8 where plaintiffs failed to allege that “at least some conduct was performed wholly intrastate”);
 9 (3) Nevada, Nev. Rev. Stat. Ann. § 598A.060(1) (2007) (“[I]t is unlawful to conduct any part of
 10 [a conspiracy in restraint of trade] in this state.”); (4) New York, *In re Wiring Device Antitrust
 11 Litig.*, 498 F. Supp. 79, 84 (E.D.N.Y. 1980) (quoting *Beltone Electronics Corp. v. Selbst*, 1977
 12 WL 18398, at *1 (N.Y. Sup. Ct. 1977), *aff'd*, 61 A.D.2d 966) (“[W]here interstate commerce is
 13 involved, the Federal antitrust laws operate to preempt the field and to oust the State courts of
 14 jurisdiction [over antitrust causes of action], even though the acts complained of may violate
 15 State antitrust laws such as [New York's] Donnelly Act.”); (5) North Carolina, N.C. Gen. Stat. §
 16 75-1 (2010) (making unlawful “[e]very . . . conspiracy in restraint of trade or commerce *in the*
 17 *State of North Carolina*”) (emphasis added); (6) South Dakota, *DRAM*, 516 F. Supp. 2d at 1098
 18 (dismissing claims under the South Dakota antitrust statute where plaintiffs only alleged that the
 19 conduct had “a substantial effect on the foreign and interstate commerce of the United States”);
 20 (7) Tennessee, *Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 523-24 (Tenn.
 21 2005) (dismissing claim where plaintiff failed “to establish how the defendant's anticompetitive
 22 conduct affected Tennessee commerce to a substantial degree even though the conduct resulted
 23 in [plaintiff] paying higher prices to retailers”); (8) West Virginia, W. Va. Code § 47-18-3(a)
 24 (“Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade
 25 or commerce *in this State* shall be unlawful.”) (emphasis added); and (9) Wisconsin, *Meyers v.
 26 Bayer AG, et al.*, 735 N.W.2d 448, 451 (Wis. 2007) (requiring allegations of price fixing that
 27 “substantially affects the people of Wisconsin and has impacts in this state when the challenged
 28 conduct occurs predominately or exclusively outside [Wisconsin].”)

1 Indeed, the IP-FAC pleads the precise opposite of what is required under these state laws.
 2 Rather than plead a conspiracy that transpired wholly within these states, Indirect Purchasers
 3 have alleged “an international conspiracy” to fix ODD prices, (IP-FAC ¶ 1), and these state
 4 claims should be dismissed.

5 **2. No Retroactive Application of State *Illinois Brick* Repealer Statutes
 6 (New Hampshire, Oregon, and Utah Antitrust Claims).**

7 Indirect Purchasers are precluded from seeking damages in New Hampshire, Oregon and
 8 Utah for alleged purchases pre-dating the passage of those states’ statutes permitting certain
 9 indirect purchaser suits.

10 a. New Hampshire: No Claims Prior to January 1, 2008.

11 New Hampshire did not allow indirect purchaser standing until January 1, 2008. See
 12 2007 N.H. S.B. 52 (cited in LexisNexis as 2007 NH ALS 336) (adding the language “regardless
 13 of whether that person dealt directly or indirectly with the defendant” to N.H. Rev. Stat. §
 14 356:11). The amended provision has no retroactive application and bars claims that accrued
 15 prior to 2008. See *In re Wal-Mart Stores*, 765 A.2d 168, 172 (N.H. 2000) (“When the legislature
 16 is silent as to whether a statute should apply prospectively or retrospectively, our interpretation
 17 turns on whether the statute affects the parties’ substantive or procedural rights. Where the rights
 18 affected by the statute are substantive, there is a presumption of prospectivity.”) (internal
 19 citations and quotations omitted); *In re Silk*, 937 A.2d 900, 904 (N.H. 2007) (statute creating new
 20 substantive rights have no retroactive application).

21 b. Oregon: No Claims Prior To January 1, 2010.

22 Oregon passed its *Illinois Brick* repealer in 2009 to permit indirect purchaser standing as
 23 of January 1, 2010. See H.B. 2584, 75th Leg., Reg. Sess. (Or. 2009); see also Oregon Bill
 24 Summary, 2009 Reg. Sess. H.B. 2584 (May 18, 2009). Prior to that, Oregon law did not allow
 25 indirect purchasers to sue for antitrust damages. See *In re Relafen Antitrust Litig.*, 225 F.R.D.
 26 14, 25 (D. Mass. 2004) (citing *Daraee v. Microsoft Corp.*, No. 0004 03311, 2000 WL 33187306,
 27 *1 (Or. Cir. June 27, 2000) (“The indirect purchaser rule of *Illinois Brick v. Illinois*, 431 U.S.
 28 720 (1977)[,] applies to Oregon’s Antitrust Act.”)). Given the absence of any retroactivity

1 clause, this substantive amendment does not apply to claims accruing prior to January 1, 2010.
 2 *See Lovinger v. Lane County*, 138 P.3d 51, 56-57 (Or. Ct. App. 2006) (“Whether a statute applies
 3 prospectively or retroactively is a question of legislative intent[.] . . . [I]n the absence of any
 4 direct evidence of the legislature’s intentions, the courts presume that statutes that are
 5 ‘substantive’ in nature are to apply prospectively.”).

6 c. Utah: No Claims Prior to May 1, 2006.

7 Utah’s repealer, Utah Code Ann. § 76-10-919, became effective May 1, 2006, and does
 8 not apply retroactively. *See* Utah Code Ann. § 68-3-3 (laws in Utah have no retroactive
 9 application unless the legislature expressly says so); *Olsen v. Samuel McIntyre Inv. Co.*, 956 P.2d
 10 257, 261 (Utah 1998).

11 **3. Failure to Serve State Attorney General (Utah Antitrust Claim).**

12 The Utah Plaintiff also has not alleged that he provided Utah’s attorney general with notice
 13 and an opportunity to prosecute a claim on their behalf, as is required under its state antitrust
 14 statute. *See* Utah Code Ann. § 76-10-919(9). This alone is a sufficient basis for dismissal.

15 **4. Indirect Purchasers Do Not Meet the Heightened Pleading
 16 Requirement of the Florida Deceptive & Unfair Trade Practices Act
 17 (Florida Consumer Protection Claim).**

18 Claims under Fla. Stat. § 501.201, *et seq.*, must be pled with particularity. *See, e.g.*,
 19 *Wrestlereunion, LLC v. Live Nation Television Holdings, Inc.*, No. 8:07-cv-2093-JDW-MSS, 2008
 20 WL 3048859, at *3 (M.D. Fla. Aug. 4, 2008) (dismissing claim under the Florida Deceptive and
 21 Unfair Trade Practices Act because general allegation that defendant “engaged in unfair methods
 22 of competition” did not meet heightened pleading requirement applied to FDUTPA claims)
 23 (internal quotations omitted); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 946-947 (N.D. Ill.
 24 2009). Indirect Purchasers do not meet this standard because they merely allege the conclusion –
 25 without any specific factual support – that “Defendants engaged in unfair competition or unfair,
 unconscionable, deceptive or fraudulent acts or practices.” (IP-FAC ¶ 366.)

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1 **5. Failure to Plead Misrepresentations that Were Directed at Consumers**
 2 **and Materially Deceptive (New York Consumer Protection Claim).**

3 The New York Plaintiff asserts a claim for relief under New York's Consumer Protection
 4 Law, N.Y. Gen. Bus. Law § 349 *et seq.*, prohibiting deceptive acts and practices. To prevail on
 5 this claim, the New York Plaintiff "must prove three elements: first, that the challenged act or
 6 practice was consumer-oriented; second, that it was misleading in a material way; and third, that
 7 the plaintiff suffered injury as a result of the deceptive act." *Flash*, 643 F. Supp. 2d at 1160
 8 (quoted *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 29 (2000)). None of these three elements are
 9 properly alleged and this claim should be dismissed.

10 First, the New York Plaintiff alleges no particular conduct specifically directed at the
 11 consuming public in New York, or indirect purchasers in New York. It is alleged that
 12 "Defendants made certain statements about ODDs and ODD Products that they knew would be
 13 seen by New York residents." (IP-FAC ¶ 374c.) But the New York Plaintiff does not identify
 14 these "certain statements," nor does he claim that they were *directed at* New York consumers.
 15 Even if the New York Plaintiff were to rely on allegations set forth in previous paragraphs of the
 16 Complaint (*e.g.*, *id.* ¶¶ 288-293), which is improper,²⁵ these allegations are insufficient because
 17 they either allege statements made by industry press, not Defendants, or statements directed at
 18 investors, not consumers. Moreover, any statements regarding OEM prices and prices for mere
 19 components of consumer products were not directed at New York consumers. A similar claim in
 20 *Flash* was dismissed for failure to allege specific misconduct directed at indirect purchasers in
 21 New York. "Other than the supposed statements made to the 'public,' there are no specific
 22 allegations that the misconduct was directed *at* any particular group, let alone Indirect Purchasers

23 ²⁵ *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, No. CV F 09-0560, 2010 WL 3521979, at
 24 *31 n.16 (E.D. Cal. Sept. 3, 2010) ("Allegations ... which incorporate each preceding
 25 paragraph, regardless of relevancy, are not permitted. This practice has been harshly
 26 criticized as a form of 'shotgun pleading' that violates Rule 8's requirement of a 'short and
 27 plain statement' and interferes with the court's ability to administer justice. The allegations
 28 in this [price-fixing complaint] are complex and span a significant time period. Avoidance of
 29 'shot-gun' pleadings goes hand-in-hand with the Court's ruling that plaintiff must allege
 29 conduct, by conspiracy and by defendants. Generalized grouping of allegations and overall
 incorporation will not survive an appropriate motion.") (internal citations omitted).

1 in New York.” *Flash*, 643 F. Supp. 2d at 1160-61 (emphasis in original). Here the claim should
 2 be dismissed also.

3 Second, the statements alleged in previous paragraphs of the Complaint are not materially
 4 deceptive acts or practices under N.Y. Gen. Bus. Law § 349. “An act or practice is deceptive if it
 5 is ‘likely to mislead a reasonable consumer acting reasonably under the circumstances.’” *In re*
 6 *New Motor Vehicles Canadian Exp. Antitrust Litig.*, 350 F. Supp. 2d 160, 197 (D. Me. 2004)
 7 (“*New Motor Vehicles*”) (quoting *Oswego Laborers’ Local 214 Pension Fund v. Marine Midland*
 8 *Bank*, 647 N.E.2d 741, 745 (N.Y. 1995)). The statements alleged in previous paragraphs of the
 9 Complaint do not satisfy this requirement because any such statements did not affect the price of
 10 ODDs or consumers’ decisions to purchase ODD-containing products. *See id.* (dismissing New
 11 York Consumer Protection Act claim where plaintiffs “do not allege any practice that could be
 12 considered deceptive or likely to mislead a reasonable consumer under section 349 . . . [T]he
 13 failure to reveal the conspiracy did not affect the price of the vehicles or the consumer’s decision
 14 to purchase the vehicle.”).

15 Third, the New York Plaintiff does not allege that he suffered injury as a result of
 16 Defendants’ alleged public statements. He does not even allege that he read or relied upon the
 17 public statements, let alone saw them, when deciding to purchase an ODD-containing product.

18 Because the New York Plaintiff has failed to adequately allege materially deceptive
 19 conduct directed at indirect purchasers in New York and that he thereby suffered injury, the New
 20 York Consumer Protection Law claim should be dismissed. *See Flash*, 643 F. Supp. 2d at 1160-
 21 61; *New Motor Vehicles*, 350 F. Supp. 2d at 196-97; *Paltre v. Gen. Motors Corp.*, 810 N.Y.S.2d
 22 496, 498 (2006) (affirming dismissal of New York consumer protection law claims because
 23 “plaintiffs failed to set forth a viable cause of action to recover damages for deceptive business
 24 practices under General Business Law § 349 [for alleged price fixing among automobile
 25 manufacturers] because the alleged misrepresentations were either not directed at consumers or
 26 were not materially deceptive”).

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28

6. No Class Actions (South Carolina Consumer Protection Claim).

2 Indirect Purchasers seek to recover on behalf of a class of South Carolina indirect
3 purchasers under South Carolina’s Unfair Trade Practices Act, which declares unfair methods of
4 competition and unfair or deceptive acts or practices unlawful. *See IP-FAC ¶ 375* (citing S.C.
5 Code Ann. § 39-5-10).) This claim fails because the statute permits only individual actions for
6 damages: plaintiffs “may bring an action individually, but not in a representative capacity, to
7 recover actual damages.” S.C. Code Ann. § 39-5-140(a). The Supreme Court of South Carolina
8 recently affirmed the dismissal of a class action filed under this statute “because SCUTPA claims
9 may not be maintained in a class action law suit” *See Dema v. Tenet Physician Servs.-Hilton*
10 *Head, Inc.*, 678 S.E.2d 430, 434 (S.C. 2009); *see also Harris v. Option One Mortgage Corp.*,
11 261 F.R.D. 98, 111 (D.S.C. 2009) (“It seems clear from the language of SCUTPA that class
12 action suits are forbidden under the Act, and the Fourth Circuit has acknowledged this rule”)
13 (*citing Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 423 (4th Cir. 2003)); *Walsh v.*
14 *Microsoft Corp.*, No. JFM-05-1277, 2005 U.S. Dist. Lexis 38871, at *9-10 (D. Md. Dec. 29,
15 2005) (noting that § 39-5-140(a) “bars [plaintiff’s] class allegations under SCUTPA” and
16 granting defendant’s motion to dismiss).

17 | V. CONCLUSION

18 For all of the above reasons, the Indirect Purchaser Plaintiffs' First Amended Complaint
19 should be dismissed with prejudice.

20 || Dated: October 12, 2010 Respectfully submitted,

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